APR 1 3 1950
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1949

No. 764

MILTON THEODORE SHAFER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit and Brief in Support Thereof.

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IN THE

Supreme Court of the United States

October Term, 1949

No. .....

MILTON THEODORE SHAFER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Your petitioner, Milton Theodore Shafer, respectfully petitions this Honorable Court for a Writ of Certiorari directed to the United States Court of Appeals for the Ninth Circuit, to review and reverse the Judgment and decision of the said Court in dismissing the appeal of your petitioner from a conviction in the District Court of the United States, in and for the Southern District of California, Central Division, and a Judgment of the Court thereon under Count One of a Three Count indictment. The Judgment of the said United States Court of Appeals was filed and entered on the 12th day of January, 1950, and your petitioner filed, on the 11th day of February, 1950, and within the time allowed therefor by rule of Court, a petition for rehearing which was denied on March 20, 1950. Your petitioner has exhausted his remedies in the United States Court of Appeals, and therefore files this petition for Writ of Certiorari with this Honorable Court for the reasons as are hereinafter set forth.

Jurisdiction.

Jurisdiction of this Court is conferred by Title 28, Section 1254, subsection 1 of the U. S. C.

U. S. C. Title 28, Section 1254, subdivision 1 reads as follows:

> "Cases in the Court of Appeals may be reviewed by the Supreme Court by the following methods:
>
> 1. By Writ of Certiorari granted upon the Petition of any party to any civil or criminal case, before or after rendition of Judgment or Decree."

Judgment and Proceedings Below.

Petitioner was indicted by the Federal Grand Jury for the Southern District of California, Central Division, on Three Counts. The First Count purportedly charged a violation of U. S. C. Title 21, Section 174 [T. R. p. 2]; at the trial after the first witness of the Government was sworn and a question asked [T. R. pp. 6 and 54] the petitioner attacked the sufficiency of the indictment by a Motion to Dismiss [T. R. pp. 5 and 6] and the trial court granted petitioner's Motion to suppress evidence and for judgment of acquittal as to Counts Two and Three of the indictment [T. R. pp. 6 and 54]; and overruled the objection to the introduction of evidence on Count One. The trial was had under Count One resulting in a conviction of petitioner and rendition of judgment thereon, on April 11, 1949, in the United States District Court for the Southern District of California, Central Division. A Motion for New Trial was filed and denied. [T. R. pp. 14 and 15.] An appeal was taken timely from the judgment rendered on the conviction. [T. R. pp. 16 and

17.] On January 12, 1950, the United States Court of Appeals for the Ninth Circuit, in case No. 12245 entitled, "Milton Theodore Shafer, Appellant, vs. United States of America, Appellee," rendered their opinions and judgment dismissing the appeal [T. R. pp. 62 to 64], and denied a petition for rehearing [T. R. p. 65] on March 20, 1950.

Questions Presented.

There is presented by this petition the following questions:

1. Did Count One of the indictment under which the petitioner was charged and convicted set out an offense under Section 174 of Title 21, U. S. C.

2. Can a court, to uphold a fatally defective indictment, which attempts to charge a crime under Section 174 of Title 21, U. S. C., and which omits essential elements of the crime created by that Statute, amend and rewrite the Statute by interpreting it to conform to the defective indictment.

3. Was the Judgment of the lower courts, under a fatally defective indictment, an unconstitutional deprivation of property and liberty without due process of law in violation of the United States Constitution, Amendment 5.

4. Was the Judgment of the lower courts, under a fatally defective indictment, an unconstitutional deprivation of the right to be informed of the nature and cause of the accusation in violation of Amendment 6 of the United States Constitution.

Statutes Involved.

The statute under which the appellant suffered a conviction is Section 174 of Title 21, U. S. C. and reads as follows:

> "If any person *fraudulently or knowingly* imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or assists in doing so, or receives, conceals, buys, sells or in any manner facilitates the transportation, concealment, or sale, of *any such* narcotic drug after being imported or brought in, knowing *the same* to have been brought in contrary to law, etc. (Title 21, Sec. 174, U. S. C.) (Italics ours.)"

Constitutional Provisions Involved.

The petitioner invokes the following provisions of the Constitution of the United States:

(1) Amendment V. No person . . . shall be deprived of life, liberty, or property, without due process of law.

(2) Amendment VI. In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation.

Reasons Why the Petition Should Be Granted.

The Petition should be granted for the reasons that are set forth more fully in the accompanying brief in addition to the very specific reason that the decision and opinion of the United States Court of Appeals for the Ninth Cir-

cuit, in the instant cause [T. R. pp. 62, 63] is in conflict with the holding and ruling of the Circuit Court of Appeals in and for the Eighth Circuit in the case of *Kalos v. U. S.*, 9 F. 2d 268 at 270. The Circuit Court of Appeals in and for the Eighth Circuit held, at page 270, in Point 3:

> "on the other point that defendant knew when the package was handed to him it concealed morphine which had been unlawfully imported, we feel the prosecution failed to make a case for the Jury. *Knowledge* by defendant that morphine was in the package is an *element of the crime made so by statute.*" (Italics ours.)

The United States Court of Appeals in and for the Ninth Circuit in the instant cause is in conflict with that decision of the Eighth Circuit by holding in substance that it is not necessary to charge in the indictment that defendant *knowingly* received, and that it is sufficient to charge that the defendant received. To arrive at this conclusion the Court of Appeals of the Ninth Circuit interpreted the statute so as to separate the adverb "knowingly" from all verbs which follow it *in seriatum* commencing with the third verb, although all the verbs following the adverb "knowingly" are the acts prohibited by the statute. In effect the said Court rewrites the statute to amend it to conform to the count one in the indictment which defectively omitted the word "knowingly" and thus failed to charge any crime under the statute.

The language of the opinion of Circuit Court of Appeals in and for the Ninth Circuit reads as follows:

> "The second clause of the statute, 21 U. S. C. Section 174, under which the indictment was drawn, makes it a crime to receive a narcotic drug upon importation, knowing the same to have been brought in contrary to law. The first count of this indictment so charges. As a matter of grammatical construction, the words 'fraudulently or knowingly,' which are part of the definition of the crime as stated in the first clause of this law, are not connected with the crime defined in the second clause." [T. R. pp. 62, 63.]

The United States Court of Appeals in and for the Ninth Circuit, by its opinion is in conflict with and is contrary to the opinion and rule as set out in *Crank v. United States,* 61 F. 2d 620, in which the Court was called upon to interpret the provisions of Section 593(b) of the Tariff Act of 1922 which, in substance, reads identically with the provisions of Section 174, Title 21, U. S. C.

The portion of the Tariff Act which was interpreted by the Circuit Court of Appeals in *Crank v. United States,* reads as follows:

> "If any person fraudulently or knowingly imports or brings into the United States, or assists in so doing, any merchandise, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been

imported or brought into the United States contrary to law, such merchandise shall be forfeited and the offender shall be fined . . . or be imprisoned . . ."

In that case the Court held at 61 F. 2d page 622:

"In order to secure a conviction under count 4 of the indictment, it was necessary that there should be proof (1) that the accused had knowingly received, concealed, bought, sold, or in some manner facilitated the transportation, concealment, or sale of such merchandise; (2) that it had been unlawfully imported; (3) that appellant knew that it had been unlawfully imported.

As was said by the Supreme Court in the case of United States v. Cook, 17 Wall. (84 U. S.) 168, 174, 21 L. Ed. 538: 'Every ingredient of which the offense is composed must be accurately and clearly alleged.' And, see, Wishart v. United States (C. C. A.), 29 F. (2d) 103, 106."

The additional specific reason why the petition should be granted is as was said by the Supreme Court in the case of *United States v. Cook, supra,* and cited in *Crank v. United States, supra*:

"Every ingredient of which the offense is composed must be accurately and clearly alleged."

The language of the statute is clear and the drawer of the indictment would have experienced no difficulty to insert the adverb "knowingly" to precede the charging verbs,

"receive," "conceal" and "facilitate" as they appear in the Count One. [T. R. p. 2.]

The decision of the United States Circuit Court of Appeals for the Ninth Circuit in the instant cause was erroneous constituted errors under the decision of this Court, conflicted with the decisions of the Circuit Court of Appeals for the Eighth Circuit, and should be reviewed by this Honorable Court to secure uniformity of decision among the Circuit Courts of Appeals.

Wherefore, your petitioner, Milton Theodore Shafer, respectfully prays that a Writ of Certiorari out of and under the seal of this Honorable Court be issued to review the judgment of the said United States Court of Appeals in and for the Ninth Circuit in the case of Milton Theodore Shafer vs. United States of America, Case No. 12245, and that the said judgment may be reversed by this Honorable Court and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

Respectfully submitted,

ARTHUR E. T. CHAPMAN,
Attorney for Petitioner.

State of California, County of Los Angeles—ss.

Arthur E. T. Chapman, being first duly sworn, deposes and says, that he is the attorney for the petitioner named in the foregoing Petition for Writ of Certiorari; that he has read the foregoing Petition for Writ of Certiorari and knows the contents thereof; and that the same is true of his own knowledge except as to the matters which are therein stated upon his information or belief, and as to those matters, that he believes them to be true.

ARTHUR E. T. CHAPMAN,

Subscribed and sworn to before me this 17th day of April, 1950.

BELLE H. WINGERS,

Notary Public in and for the County of Los Angeles, State of California.

My commission expires March 30, 1954.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.
No. .....

MILTON THEODORE SHAFER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS IN AND FOR THE NINTH CIRCUIT.

Jurisdiction.

Jurisdiction of this Court is conferred by Title 28, Section 1254, Subsection 1 of the U. S. C.

U. S. C., Title 28, Section 1254, Subdivision 1, reads as follows:

> "Cases in the Court of Appeals may be reviewed by the Supreme Court by the following methods: 1. By Writ of Certiorari granted upon the Petition of any party to any civil or criminal case, before or after rendition of Judgment or Decree."

Opinions Below.

No opinion was delivered by the District Court before whom the case was tried. A *Per Curiam* opinion was delivered by the United States Court of Appeals in and for the Ninth Circuit which appears on pages 62

and 63 of the Transcript of Record and is set out herein for the convenience of this Honorable Court which reads as follows:

"PER CURIAM OPINION.

The defendant, with others was indicted on three counts. The first count was for receiving upon importation a narcotic drug, knowing it to have been imported contrary to law. The second was for the knowing purchase of a narcotic drug which was not in or from the original stamped package. The third charged all the defendants entered into a conspiracy knowingly to import and to receive this narcotic drug into the United States from Mexico.

The second clause of the statute, 21 U. S. C. A., Sec. 174, under which the indictment was drawn, makes it a crime to receive a narcotic drug upon importation, knowing the same to have been brought in contrary to law. The first count of this indictment so charges. As a matter of grammatical construction, the words 'Fraudulently or knowingly,' which are part of the definition of the crime as stated in the first clause of this law, are not connected with the crime defined in the second clause. The textual criticisms made in the argument are extremely tenuous and unsound. The Court, under the indictment, would be required to charge not only that the exact knowledge specified in the statute must be found, but also to charge that a definite criminal intent existed, before conviction could ensue. United States v. Amorosa, 3 Cir., 167 F. 2d 596, 598; United States v. Martinez, 73 F. Supp. 403, 407. The defendant was in no doubt as to the crime charged in this count."

The portions of the opinion which do not appear herein are not pertinent to this Petition for Writ of Certiorari for the reason that no point is raised in relation thereto.

ARGUMENT.

POINT I.

Count 1 of the Indictment Did Not State Facts Sufficient to Constitute an Offense Against the Laws of the United States.

The statute under which petitioner suffered conviction read as follows:

> "If any person, *fraudulently or knowingly,* imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or assists in doing so, or receives, conceals, buys, sells or in any manner facilitates the transportation, concealment, or sale, of any such narcotic drug after being imported or brought in, knowing the same to have been brought in contrary to law, etc." (Title 21, Sec. 174, U. S. C.) (Italics ours.)

The author of the indictment did not charge all of the acts prohibited by the section, but only the receipt, concealment and facilitating the transportation after importation of a certain drug * * * as the defendant then and there well knew had been imported into the United States contrary to law.

Such acts as the statute denounces shall be done *"fraudulently and knowingly."* Such acts that are here charged against petitioner were not done "fraudulently and knowingly," for the reason that the count in question does not so charge.

It is axiomatic in criminal pleading that a criminal *scienter* shall be made to appear in the evidence if the offense sought to be charged is not one *"malum per se."* In this case the criminal *scienter* is found in the words of

the statute, "fraudulently and knowingly," and their omission is fatal to the count.

> "The words 'wilfully,' 'maliciously,' 'wilfully and maliciously,' or 'knowingly and wilfully,' etc., must be stated when they constitute part of the statutory definition of the offense."
>
> Am. Jur., Vol. 29, page 629, Sec. 67 (and cases cited).

The general rule on this proposition has been very succinctly stated in Corpus Juris Secundum, as follows:

> "As stated in Corpus Juris, which has been quoted and cited with approval, an indictment for an offense created by statute must be framed on the statute, and this fact must distinctly appear on the face of the indictment itself, and in order that it shall so appear, the pleader must either charge the offense in the language of the act, or specifically set forth the facts constituting the same. The general rule is that the charge shall be so laid in the indictment or information as to bring the case precisely within the statute, alleging distinctly all the material facts and circumstances necessary to constitute the essential requisites of the offense."
>
> Corpus Juris Secundum, Vol. 42, Sec. 137, p. 1032.

Referring to pages 21 and 22 of the Transcript of Record, we find petitioner's position adequately stated.

> "Directing Your Honor's attention to Count One of the indictment, Your Honor will see that it is laid under Title 21, Section 174.
>
> Title 21, Section 174, is predicated partly upon Title 21, Section 173. Title 21, Section 174, says that if any person fraudulently or knowingly imports or brings into the United States—the indict-

ment fails to set forth in any place in count 1 that any of these acts was done fraudulently or knowingly by either of the defendants.

The Court: Count 1 does. Count 1 is in several alternatives: 'If any person fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory, or assists in so doing, or receives, conceals, buys, sells or in any matter facilitates the transportation, concealment or sale—'

Mr. Strong: It is our position the word 'fraudulently' or 'knowingly' applies to all of the alternatives.

The Court: That is correct. They have charged here that they did receive, conceal and facilitate the transportation after importation, and the last line says, 'The defendants well knew it had been imported into the United States of America contrary to law.

Those two are separate requirements of knowledge and the first requirement—

The Court: In other words, your position is they must knowingly conceal it.

Mr. Strong: They must fraudulently or knowingly receive, conceal or facilitate the transportation of it.

The Court: And the second is that they must know it was imported contrary to law.

Mr. Strong: Yes. And the statute itself in certain instances eliminates the knowledge as to the second part, in certain instances, by a presumption which is written into 174 but that only goes to the second part, as to the knowledge of it having been imported contrary to law.

But the offense that is actually charged here has to be alleged in the terms of the statute of having been committed fraudulently or knowingly, the actual act, which is the offense of concealing."

The foregoing reference embodies the complaint of this petitioner. On pages 48 *et seq.* of the Transcript will be found the ruling that held contrary to appellant's position. Counsel desires to point out in passing the language of the trial court on this score. The Court said:

> "I think if I were drawing the indictment, however, I would have put in 'did knowingly, unlawfully, willfully, feloniously, illegally' and so on and so forth 'received,' but it isn't here." [T. R. p. 48.]

It has been held as a rule of construction that:

> "Criminal statutes must be strictly construed."
>
> *Tanner v. United States,* 128 F. 2d 970.

Alluding to the descriptive words which the trial court stated he would have inserted if he were drawing the indictment, we cite the following:

> "Allegations of essential elements of statutory offense are matters of substance and not of form, and their omission is not aided by verdict."
>
> *Harris v. U. S.,* 104 F. 2d 41,

and

> "Where guilty knowledge is a substantive ingredient of the offense it must be alleged."
>
> *United States v. Buzzo,* 85 U. S. 18, 21 L. Ed. 812.

In view of the above authorities, the "knowledge" of the defendant that he was receiving contraband, for whatever purpose, is a substantial and an essential ingredient of the offense and if one is accused of the offense under consideration without a sufficient allegation that he possessed himself of the "drug" "knowingly" or "fraudulently," as the statute directs, the omission of such allega-

tion is fatal. The courts have consistently held that even considering the indictment as a whole, or in all of its parts, cannot suffice to supply the needed language.

> "The rule that all parts of an indictment should be taken into consideration, and that indictment should be reasonably construed, does not warrant court in supplying needed language which is essential to a necessary element of the offence."
>
> *Mitchell v. U. S.*, 118 F. 2d 653.

Referring again to the language of the court on page 22, the expression, "The defendant well knew it had been imported into the United States contrary to law," omits the full reading of the matter.

In the language of Count 1 [Tr. p. 2] the expression "then and there" is included, making the full statement read:

> "The defendants then and there well knew, had been imported, etc."

We are thus faced with the situation where the trial court seeks to supply statutory elements (guilty *scienter*) to a count where such elements or ingredients are missing. The following is in point:

> "Where the charging part of an indictment for murder is in one sentence and the word 'feloniously,' used in relation to the assault, is so connected with the subsequent portion of the sentence as to modify them by a fair and reasonable interpretation, it is not necessary to repeat the word 'feloniously' in connection with each act necessary to constitute the crime, but if the pleader uses words to describe the intent with which the mortal wound was inflicted, other than those used to charge the intent with which

> the assault was made, the words 'then and there' used in connecting the inflicting of the mortal wound with the felonious intent, will be interpreted to refer to time and place merely, and not as a vehicle to convey the intent with which the assault was made through the indictment so as to modify the intent in making the mortal wound."
>
> *Wright v. U. S.*, 90 Pac. 732, 18 Okla. 510, 11 Am. Cases, 994.

In the case at bar there is no direct *scienter* charged, as the statute directs, and the use of the expression "then and there well knew" cannot be relied on to supply the necessary *scienter*. In other words, the expression "then and there well knew," merely brings forward prior averments of date and venue, and do not otherwise enlarge the description of the offense.

Shaw v. U. S., 165 Fed. 174.

Petitioner's complaint is as much directed toward the reasoning of the trial court in sustaining the count as in the inherent weakness of the count itself. [T. R. p. 48.] The following is noted from the record:

> "I think that the knowledge there applies to the knowledge that it was imported contrary to law, and if a person receives it and the indictment alleges that at the time and place they did receive, conceal and facilitate the transportation, and so forth, they did know it had been imported into the United States contrary to law." [T. R. pp. 48 and 49.]

The Court then adopts the concluding verbiage of the law to fabricate the receipt of the drug as fraught with

the presumption of guilty knowledge. Note the further language of the Court:

> "Moreover, by conclusion in this respect is fortified by the last sentence in Section 174, because it says:
>
> > 'Whenever on trial for a violation of this Section, the defendant is shown to have or have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.'
>
> Now, this charges that he did receive it, conceal it, and so forth. So if he received it and concealed it be must have possessed it and that depends on whether or not the evidence at the trial bears that out. But all I am dealing with now is the language of this indictment."

There can be no doubt that the Court was influenced in ruling the count good by the presumption of unlawful possession expressed in the concluding paragraph of the section. It is appellant's contention that the Court was in error in so ruling. The language, "Whenever on trial for a violation of this Section, etc.," very plainly has nothing whatever to do with the indictment under which the trial occurred. The trial mentioned wherein defendants' possession of the "drug" is presumed unlawful is an event having a previous valid indictment to warrant such a trial. The Court in passing on the validity of Count 1 gave to the latter paragraph an importance in interpreting the section that was plainly erroneous. No-

where does the Court make plain the validity of the count with its omitted statutory terminology, save in the following language:

> *"The Court*: It says:
>
> 'Whenever on trial,' and I pointed out that may now show on the trial, but the indictment says that he did receive it and conceal it. Now, the receiving, and so forth, implies possession, so on the face of this indictment I am saying that this does not charge a crime because of that presumption. I am saying that this does charge a crime *because of that presumption,* which is contained in the statute, which merely fortifies the conclusion I urged concerning the first count." [T. R. pp. 49-50.]

From the foregoing it cannot be gainsaid but that the Court held Count 1 valid because of the "presumption" of illegality attaching to appellant's possession of the "drug." The "presumption" alluded to does not come into existence except in a trial upon a valid indictment. It can play no part in construing the allegations of an accusatory instrument, yet the record shows that the trial court seized on that presumption and forced appellant to his trial for that reason alone, on a count that was fatally defective. In all cases, as we have pointed out, where an indictment is framed upon a statute, making a course of conduct a crime, the Supreme Court of the United States has very clearly held what the law is with respect to such an indictment.

> "We have no disposition to qualify what has been already frequently decided by this Court, that where a crime is a statutory one it must be charged with

> ***precision and certainty,*** and every ingredient of which it is composed must be ***clearly and accurately*** set forth, and that even in the case of misdemeanors the indictment must be free from all ambiguity and leave no doubt in the mind of the accused and the court of the exact offense intended to be charged."
>
> *Ledbetter v. U. S.*, 170 U. S. 606, 42 L. Ed. 1162 (and cases cited).

The elements of the crimes created by Section 174 are:

1. The crime of fraudulently or knowingly importing or bringing any narcotic drug into the United States contrary to law.

2. The crime of assisting another person in fraudulently or knowingly importing or bringing any narcotic drug into the United States contrary to law.

3. The crime of fraudulently or knowingly receiving or concealing or buying or selling or in any manner facilitating the transportation, concealment or sale of any ***such*** (italics ours) narcotic drug after being imported or brought in, ***knowing the same*** (italics ours) to have been imported contrary to law. The italicized words *"the same"* and *"such"* refer back to the same narcotic drug specifically described and classified in the first part of the sentence of Section 174, to-wit: "fraudulently or knowingly imports or brings any narcotic drug into the United States." Those words refer not to just any narcotic drug imported contrary to law but they refer specifically to any narcotic drug which was fraudulently and knowingly brought in contrary to law. Such words

make the first portion of the first sentence of Section 174 a part of the elements of the crimes which relate to receiving or concealing or facilitating; by such reference Congress, in creating crimes which relate to receiving, concealing or facilitating, made the necessary elements as follows:

A. A narcotic drug which had fraudulently or knowingly been imported into the United States contrary to law, B. and knowingly received such narcotic drug which has been fraudulently and knowingly imported into the United States contrary to law, C. knowing that such fraudulently or knowingly imported narcotic drug had been imported contrary to law; had Congress intended that the mere receipt of any narcotic drug which had been imported contrary to law would be the only elements of crime created by it, it would have said receiving any narcotic drug and not any *such* narcotic drug. The *scienter* is not limited to knowing that a narcotic drug was imported contrary to law; the *scienter* is the knowledge by the defendant when he receives a narcotic drug, as in *Kalos v. United States*, 9 F. 2d 268 at 270, which holds at page 270 in Note 3, "On the other point, that defendant knew when the package was handed to him it concealed morphine which had been unlawfully imported, we feel the prosecution failed to make a case for the jury. Knowledge by defendant that morphine was in the package is an element of the crime, made so by statute," and knowing that it was a narcotic drug which had been fraudulently or knowingly imported contrary to law.

POINT II.

The United States Court of Appeals Erred in Attempting to Uphold the Fatally Defective Indictment by Amending and Rewriting the Statute Through Its Interpretation to Conform to the Indictment.

The grammatical construction urged in the opinion would indicate that adverbs do not modify all the verbs that follow them *in seriatim*. Such construction would of necessity require a repetition of the adverb to modify every verb which follows it to effectively modify each of such verbs. The ordinary drafting of statutes, informations and indictments never require such a repetition and it has been customarily accepted as a matter of grammatical construction that the one adverb preceding a series of verbs modify each of such verbs.

The Court, by its decision, relies on the fact that a Jury would be charged that it must find the very elements which we contend had to be set out in the indictment, and that it would be charged before it could find a verdict, and that therefore, the judgment of conviction of the lower Court should have been upheld under the indictment which we contend is fatally defective as has been heretofore shown in Point One of the Brief. The decision of the United States Court of Appeals relies upon an aider by verdict. A fatally defective indictment cannot be cured or aided by a Jury even though the Jury may have found a defendant guilty after having been properly charged of all

the elements of a crime which were not set forth in the indictment. The statutes were being interpreted to uphold a fatally defective indictment and the decision of the Court is in conflict with the existing decision of the opinions of *Kalos v. United States of America, supra; Tanner v. United States, supra; Harris v. United States, supra; Mitchell v. United States, supra.*

For the purpose of brevity the arguments set forth in Point One are realleged and repeated herein in support of this Point Two.

POINT III.

The Indictment Being Fatally Defective Petitioner Suffered an Unconstitutional Deprivation of Property and Liberty Without Due Process of Law in Violation of the United States Constitution, Amendment V.

The statutes under which the defendant was properly indicted was a federal criminal statute, Section 174, Title 21, U. S. C. The defendant having suffered a conviction under a fatally defective indictment has been deprived of property and liberty without due process of law.

Argument of Point One of the Brief is herewith reiterated and realleged in support of this point.

POINT IV.

The Judgment of the Lower Courts Hereunder Under a Fatally Defective Indictment Deprived the Petitioner of the Right to Be Informed of the Nature and Cause of the Accusation in Violation of Amendment VI of the United States Constitution.

Petitioner was required to stand trial under a fatally defective indictment and he was not informed of the nature and cause of accusation which constituted a violation of a criminal statute of the United States of America.

Therefore, by reason of all the foregoing we pray the Court to consider the petition to which this Brief is annexed and issue its Writ in accordance with the prayer thereof.

Respectfully submitted,

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Attorney for Petitioner.

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Statute:

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 764

MILTON THEODORE SHAFER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 62-64) is reported at 179 F. 2d 929.

JURISDICTION

The judgment of the Court of Appeals was entered January 12, 1950 (R. 64-65), and a petition for rehearing was denied March 20, 1950 (R. 65). The petition for a writ of certiorari was filed April 19, 1950. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F.R. Crim. P.

QUESTION PRESENTED

Whether the count of the indictment under which petitioner was convicted charged all the elements of the offense prescribed by the statute under which it was drawn.

STATUTE INVOLVED

Section 2 of the act of February 9, 1909, c. 100, 35 Stat. 614, as amended, 21 U.S.C. 174, provides:

> If any person fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or assists in so doing or receives, conceals, buys, sells or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, such person shall, upon conviction, be fined not more than $5,000 and imprisoned for not more than ten years. Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

STATEMENT

The first count of a three count indictment filed in the United States District Court for the Southern District of California (R. 2-5) charged that on or about September 23, 1948, petitioner and two other defendants, in violation of 21 U.S.C. 174,

"did receive, conceal, and facilitate the transportation and concealment, after importation, of a certain narcotic drug, namely: approximately 227 grains of heroin, which said heroin, as the defendants then and there well knew, had been imported into the United States of America contrary to law" (R. 2-3). Prior to the introduction of the evidence, the trial court granted judgments of acquittal in respect of counts 2 and 3 on petitioner's motion that they did not state offenses under the laws of the United States (R. 6, 50, 54),[1] but overruled an identical objection to count one (R. 6, 50). The jury found petitioner guilty on that count (R. 7) and he was sentenced to pay a fine of $5,000 and stand committed until such fine is paid and to imprisonment for one year, but the execution of the imprisonment sentence was suspended and he was placed on probation for three years (R. 16).

ARGUMENT

Petitioner's sole contention is that the words "fraudulently or knowingly" in the first *disjunctive* clause of 21 U.S.C. 174 denouncing the unlawful importation of narcotic drugs apply as well to the acts of receiving, concealing and facilitating the transportation and concealment of unlawfully imported narcotics which are denounced in the sec-

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[1] Count 2 charged the defendants with knowingly purchasing heroin which was not in or from the original stamped package and count 3 charged a conspiracy knowingly to import heroin from Mexico into the United States (R. 3-5).

ond clause, and that the first count of the indictment was fatally defective because it failed to allege that the defendants "fraudulently and knowingly" received, etc., the heroin, but alleged only that they received it knowing that it had been imported contrary to law. The Court of Appeals rejected this contention and another not renewed here and dismissed the appeal as frivolous (R. 62-64).

The Court of Appeals was unquestionably right, since the statute clearly defines two categories of offenses: (1) importations of narcotics contrary to law and (2) dealing in such drugs after importation. The words "fraudulently or knowingly" define only the scienter required to bring an importation contrary to law within the proscription of the first clause. The second clause contains its own requirement of scienter, i.e., "knowing the same to have been imported contrary to law." The statute is aimed not only at unlawful importations, but at trafficking in narcotics imported in violation of law. It reaches not only the importer, but others who deal in narcotics illegally brought into the United States. Because of the differences in the two types of offenses, it was natural for Congress to prescribe knowledge of the unlawfulness of the importation as an element of the offense of importing and to require only knowledge that the drug had been brought in contrary to law as an element of the offenses denounced in the second clause. These differences in respect of the scienter required are

unambiguously reflected in the structure of the statute.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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